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No. 06-856

Supreme Court, U.S.
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In The
Supreme Court of the United States

JAMES LARUE,

Petitioner,

v.

DEWOLFF, BOBERG & ASSOCIATES, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS*[1]

The National Employment Lawyers Association ("NELA") and its 67 state and local affiliates have a membership of over 3,000 attorneys. NELA is the nation's largest professional membership organization of lawyers who represent employees in labor, employment, and civil rights disputes. NELA supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the interpretation and application of the Employee Retirement Income Security Act (ERISA) to ensure that the rights of workers are protected. For example, NELA filed or participated in filing *amicus curiae* briefs in this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); and *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004).

ERISA Sections 409 and 502(a)(2) together authorize a plan participant to file suit on behalf of his or her plan to restore losses to the plan occasioned by a breach of fiduciary duty. 29 U.S.C. §§ 1109, 1132(a)(2). Regarding the first question presented, in NELA's view, these sections contemplate relief for any loss suffered by a plan, regardless of whether all participants in the plan are harmed by the loss.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no person or entity other than *amicus curiae* and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party to this matter authored this brief in whole or in part. Petitioner has filed a consent to the filing of *amicus* briefs with the Clerk of this Court. Respondent has separately consented to the filing of this brief.

Neither the statute nor this Court's prior interpretation of it in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), requires that such a claim be supported by a showing that not only the plan itself, but all participants in the plan, have suffered a loss due to the breach. NELA members represent participants in defined contribution pension plans who have an interest in ensuring that losses to those plans due to fiduciary breaches can be restored pursuant to Sections 409 and 502(a)(2) without regard to whether the losses affect one participant, a subset of participants, or all participants.

Regarding the second question presented, NELA supports the position of Petitioner, the Solicitor General, and other *amici* that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), as interpreted by this Court in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), authorizes a claim for make-whole monetary relief by a plan participant or beneficiary against a breaching fiduciary, because such relief was typically available in equity in the days of the divided bench. It is NELA's further view, however, that the *Mertens* gloss on the statutory provision for "appropriate equitable relief" incorrectly severed ERISA remedies from their trust-law roots, leading to inconsistent and unpredictable outcomes in the lower courts and frustrating the Congressional purpose of providing remedies for the fiduciary obligations imposed by the statute. NELA members represent participants in ERISA-governed pension and welfare benefit plans who have an interest in ensuring that the duties imposed on their plans' fiduciaries are enforceable under the statute.

For these reasons, *amicus* respectfully requests that the Court consider its views in support of Petitioner.

SUMMARY OF ARGUMENT

The first question presented, whether a participant in a defined contribution pension plan may file suit under ERISA Section 502(a)(2) to compel a fiduciary to restore losses to the plan occasioned by a fiduciary breach that affected only the participant's individual account, should be answered in the affirmative. This Court has consistently refused to countenance remedies under ERISA that are not expressly authorized by the statute, and has equally refused to countenance implied limitations on the remedies that the statute does expressly authorize. ERISA Sections 502(a)(2) and 409 together authorize a participant to file suit to impose on a fiduciary personal liability to make good "any losses" to a plan that result from a breach of fiduciary duties. 29 U.S.C. §§ 1132(a)(2), 1109. By operation of the statute and consistent with the law of trusts, every ERISA-governed pension plan, even a defined contribution plan, consists of a unitary corpus of trust assets. Therefore, any loss to an account in such a plan is a loss to the plan as a whole. Nothing in the statute authorizes limiting the relief under Section 502(a)(2) to breaches of fiduciary duty that result in losses affecting more than one account in an individual account plan. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), is not to the contrary, but merely stands for the proposition that Section 502(a)(2) does not authorize a claim for relief that flows directly to the plan participant, where the plan itself has not suffered a loss due to the alleged breach.

The second question presented, whether ERISA Section 502(a)(3) authorizes a claim for make-whole monetary relief against a breaching fiduciary, should also be answered in the affirmative. As Petitioner, the Government, and other

amici argue, such relief was "typically available in equity" as required by *Mertens v. Hewitt Associates,* 508 U.S. 248 (1993). However, NELA further contends that the *Mertens* standard improperly decouples trust-law fiduciary responsibilities from trust-law remedies, contrary to Congress's intent in incorporating principles of trust law into ERISA. The requirement that relief have been "typically available in equity" is not grounded in any trust-law standard, has resulted in inconsistent and result-oriented decision-making in the lower courts, has been widely decried by courts and commentators, deprives plan participants of remedies for violations of fiduciary duties, and should be overruled.

ARGUMENT

I. Section 502(a)(2) Provides Relief for *Any* Loss to a Plan, Regardless of the Number of Affected Participants.

The court below held that where the effect of a breach of fiduciary duty is limited to assets allocated to the account of a single participant in an "individual account" or "defined contribution" pension plan, that participant cannot state a claim under Section 502(a)(2) because the losses resulting from the breach are losses to an individual participant, not losses "to the plan as a whole." *LaRue v. DeWolff, Boberg & Associates*, 450 F.3d 570, 573-74 (4th Cir. 2006) (*LaRue I*). This holding ignores the plain text of the statute and the structure of defined contribution plans, misconstrues this Court's decision in *Russell*, and establishes a distinction between breaches affecting a single participant and those affecting more than one participant that is unsupported by any authority or policy.

A. Nothing in the Text of ERISA Limits Section 502(a)(2) Claims to Plan Losses Affecting More Than One Participant.

ERISA § 502(a)(2) provides that a participant may bring a civil action for "appropriate relief under section 1109 [section 409]." 29 U.S.C. § 1132(a)(2). Section 409(a), in turn, imposes personal liability on plan fiduciaries to "make good to such plan *any losses* to the plan" resulting from breaches of fiduciary duty. 29 U.S.C. § 1109(a) (emphasis added).[2] Thus, by its terms, the statute requires that *any losses* occasioned by a breach be restored, not just particular kinds of losses or losses affecting particular individuals or groups of participants.[3]

When interpreting ERISA's civil enforcement provision, Section 502(a), this Court has given effect to the plain language of the statute in view of the "evident care" with which Section 502(a) was crafted. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). Accordingly, this Court has been unwilling to read into ERISA any implied claims or remedies, *see id.*, as well as

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[2] The Section 502(a)(2) cause of action is analogous to the common-law cause of action of a beneficiary against a trustee to restore trust assets lost due to a breach of trust. *Graden v. Conexant Systems, Inc.*, 2007 WL 2177170, at *2 (3d Cir. July 31, 2007).

[3] In *LaRue I*, the court suggested that the nature of the breach, in addition to the nature of the loss, might be a basis for finding Mr. LaRue's claim not cognizable under Section 502(a)(2). The court wrote that the "loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him." *LaRue I*, 450 F.3d at 574. However, Section 409 imposes personal liability on any fiduciary "who breaches *any* of the responsibilities, obligations, or duties imposed upon fiduciaries by this title." 29 U.S.C. § 1109(a) (emphasis added). Section 409 does not authorize a distinction between duties owed to participants individually and duties owed to participants as a group.

to read into ERISA any limitations on claims or remedies. For example, in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), the defendant employer argued that because Section 502(a)(2) specifically allowed claims to remedy fiduciary breaches, such claims could not be pursued under Section 502(a)(3), 29 U.S.C. § 1132(a)(3). This Court rejected that argument because the plain language of Section 502(a)(3) allows, without limitation, suits to remedy violations of ERISA. *Id.* at 509. Likewise, in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 239 (2000), the Court refused to limit the universe of defendants who could be sued under Section 502(a)(3) because there was no such limiting language in that provision.

Nothing in the text of Sections 409 or 502(a)(2) limits claims cognizable under Section 502(a)(2) to claims that seek to recover a plan's losses under circumstances where more than one participant is harmed by the plan's loss, and no such limitation can be read into Section 502(a)(2).

B. An Allegation of a Loss Affecting a Single Plan Account Is an Allegation of Loss to the Plan.

Although the plan in which Mr. LaRue participated is an individual account or defined contribution plan, a reduction in the plan's assets is a loss to the plan regardless of whether the loss affects assets allocated to one account or all accounts, because the plan consists of a unitary corpus of trust assets. Thus, the loss alleged by Mr. LaRue is a plan loss.[4]

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[4] The Fourth Circuit focused on Mr. LaRue's allegation of a loss "to his 'interest in the plan'" rather than a "'loss to the plan.'" *LaRue v.*

(Continued on following page)

Regardless of whether a pension plan is a defined benefit plan or a defined contribution plan,[5] ERISA requires that plan assets be held in trust by one or more trustees who have exclusive authority and discretion to manage and control the assets. *See* ERISA § 403(a), 29 U.S.C. § 1103(a); IRC § 401(a). It is the trustee, not the plan participants, who holds legal title to all of the plan's assets. *See* Rev. Rul. 89-52, 1989-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989). Indeed, it is a cardinal principle of trust law that title to trust assets is held by the trustee for the benefit of the trust beneficiaries. *See, e.g.*, CHARLES E. ROUNDS, JR., LORING: A TRUSTEE'S HANDBOOK, 2001 ed. (Aspen Pubs.) at 1 ("[T]itle and asset segregation are the keys to unlocking the secret of the trust."); GEORGE G. BOGERT & DALLIN H. OAKS, HANDBOOK ON THE LAW OF TRUSTS, 5th ed. (West 1973) at 1 ("A trust is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another."). Because it is a fundamental characteristic of trusts that all of their assets are held by the trustee, it follows that any reduction in the value of those assets is a loss to the trust itself.

That certain types of ERISA plans, such as the plan here, permit participants to direct the investment of assets allocated to their accounts among various investment

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DeWolff, Boberg & Assocs., Inc., 458 F.3d 359, 361 (4th Cir. 2006) (*LaRue II*). Notwithstanding this wording, the nature of an ERISA-governed pension plan is such that there can be no loss to a participant's "interest in the plan" without a loss to the plan as a whole, as discussed below.

[5] *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 364 n.5 (1980) (distinguishing defined benefit and defined contribution pension plans).

options selected by the plan's fiduciaries does not alter this fundamental trust law principle. Participants still lack actual ownership over the assets allocated to their accounts and trustees still hold legal title. *See* Rev. Rul. 89-52, 1989-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989) ("While a qualified trust may permit a participant to elect how amounts attributable to the participant's account balance will be invested, it may not allow the participant to have the right to acquire, hold and dispose of amounts attributable to the participant's account balance at will.") (citations omitted). Instead, the amounts recorded in each individual "account" together make up the plan's assets. DAN M. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS, 5th ed. (Pension Research Council 1984), at 99 (in a defined contribution plan, "[t]he sum of all of the account balances on any valuation date usually equals the total market value of the plan assets"). Accordingly, whenever there is a loss reflected in an individual "account" in a defined contribution plan, such as the plan here, there is a corresponding loss to the plan as a whole. *See* Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 235 (2004) ("In [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts."). Thus, contrary to the Fourth Circuit's rationale, there is no such thing as a loss to a participant account that is separate from or independent of a loss to the plan as a whole.

Because Sections 502(a)(2) and 409 together authorize a participant to file suit to recover "any loss" to a plan occasioned by a breach of fiduciary duty, the statute empowers Mr. LaRue to proceed on behalf of his plan to

compel the plan's fiduciaries to make good to the plan the losses to the trust corpus occasioned by the alleged breach, notwithstanding that those losses were allocated to Mr. LaRue's individual account.

C. This Court Held in *Russell* That Section 502(a)(2) Claims Are Limited to Those Involving Plan Losses.

The Fourth Circuit invoked the holding of *Russell* that recovery under Section 502(a)(2) must inure to the benefit of the plan rather than to the benefit of a participant or beneficiary, but failed to properly apply that holding. In *Russell*, the subject plan's fiduciaries terminated an individual participant's disability benefits. *Russell*, 473 U.S. at 137. After the fiduciaries reversed their decision and reinstated the benefits, the participant filed suit for breach of fiduciary duty, claiming that the interruption of benefit payments aggravated her psychological and physical conditions and seeking, assertedly pursuant to Section 502(a)(2), punitive and emotional distress damages to be paid directly to her. *Id.* at 138. The participant did not assert that the alleged breach caused losses to the plan; on the contrary, the plan presumably benefitted financially from the delay in paying out the benefits.

This Court held that Section 502(a)(2)'s authorization of a participant suit to make good losses to a plan did not extend to the relief sought by the plaintiff in *Russell*. Rather, this Court held that "recovery for violation of § 409 inures to the benefit of the plan as a whole." *Id.* at 140. However, contrary to the Fourth Circuit's interpretation in this case, *Russell* does not stand for the proposition that a

Section 502(a)(2) claim is not cognizable under any circumstance where relief to the plan will ultimately benefit individual plan participants. *See LaRue I*, 450 F.3d at 573 (holding relief under Section 502(a)(2) cannot inure "to particular persons with rights under the plan"). Indeed, because a pension plan must be administered for the exclusive purpose of providing benefits to participants,[6] the Fourth Circuit's interpretation would render Section 502(a)(2) a dead letter, because any recovery of losses to a plan must ultimately inure to the benefit of "particular persons with rights under the plan."

Because *Russell* merely distinguished between a suit seeking damages for a plan participant, unrelated to any plan loss, and a suit seeking to restore losses to a plan occasioned by a fiduciary breach, *Russell* does not support the holding below.

D. There Is No Justification for Distinguishing Between Plan Losses Affecting a Single Account in an Individual Account Plan and Plan Losses Affecting Multiple Accounts.

As the Fourth Circuit correctly recognized, nothing in Section 502(a)(2) supports a distinction between a claim to restore losses to a plan where the alleged breach has affected a subset of plan accounts and a claim to restore losses to a plan where the alleged breach has affected all plan accounts. *LaRue II*, 458 F.3d at 362-63. However, the

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[6] *See* ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) ("[A] fiduciary shall discharge his duties with respect to a plan . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries; and . . . defraying reasonable expenses of administering the plan."

Fourth Circuit discerned a line separating such claims from claims to restore losses to a plan where the alleged breach has affected only a single account. *Id.* Just as there is nothing in the text of ERISA to support limiting Section 502(a)(2) claims to those seeking to remedy a loss affecting all plan accounts, there is nothing in the text of the statute to support allowing Section 502(a)(2) claims where more than one, but fewer than all, plan participants are affected by a plan loss while not allowing Section 502(a)(2) claims where only one participant is affected.

The decisions cited by the Fourth Circuit do not support the proposition that relief for a breach that affects one account is unauthorized "individual" relief. Instead, like *Russell*, these cases seek to distinguish between situations where a participant files an individual claim seeking damages payable directly to the participant, and situations where one or more participants seek to have losses "made good" to the plan by a breaching fiduciary. *See In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 240, 241 (3d Cir. 2005) (distinguishing *Russell* on the ground that "it only held that a single plan participant, seeking individual recovery for extra-contractual damages payable directly to her, could not proceed with her lawsuit" under Section 502(a)(2) and holding that *Russell* "never reached the conclusion . . . that standing can exist under [§ 1132(a)(2)] only if all plan participants would benefit from the litigation"); *Kuper v. Iovenko*, 66 F.3d 1447, 1452-53 (6th Cir. 1995) (holding that "§ 1109 contemplates that breaches of fiduciary duty injure the plan, and, therefore, any recovery under such a theory must go to the plan" and distinguishing "between a plaintiff's attempt to recover on his own behalf and a plaintiff's attempt to have the fiduciary reimburse the plan"); *see also Milofsky v. Am.*

Airlines, Inc., 442 F.3d 311, 313 (5th Cir. 2006) (allowing Section 502(a)(2) claim to proceed where subset of plan participants were affected, but expressing no opinion on whether the result would be different if only one participant was affected); *Steinman v. Hicks*, 352 F.3d 1101, 1102 (7th Cir. 2003).

Further, there is no meaningful way to differentiate among Section 502(a)(2) claims involving subsets of plan participants. If a plan loss affecting a single participant is deemed insufficient to give rise to a Section 502(a)(2) claim, is a plan loss affecting two participants – that is, two individuals – also insufficient? The relevance of the requisite number of affected participants in relation to the total number of plan participants must also be considered. If one or two affected participants is insufficient to permit a Section 502(a)(2) claim in the context a plan with a thousand participants, does the result change if the plan only has three participants? If so, when does the ratio of affected plan participants to total plan participants tip the balance? And what if the bulk of the plan assets are allocated to a single account – is relief for a breach affecting only that account "individual" relief, or relief to "the plan as a whole"? As these questions illustrate, there is no principled way for this Court to draw a line between Section 502(a)(2) claims affecting all or multiple plan participants and those affecting a single plan participant. Moreover, the text of the statute does not support drawing such a distinction. So long as the claim seeks to remedy a loss to the plan, Section 502(a)(2) provides a remedy.

While Petitioner's case presents the outward limits of 502(a)(2) in that his claim involves a plan loss affecting only one participant, most participants seeking relief under Section 502(a)(2) are seeking to remedy plan losses

affecting a large portion of plan participants. *See Kuper*, 66 F.3d at 1450 (subset of plan participants comprising participants in ESOP); *Smith v. Sydnor*, 184 F.3d 356, 363 (4th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000) (subset of plan participants whose accounts held preferred company stock); *In re Xerox Corp.*, 483 F. Supp. 2d 206, 221 (D. Conn. 2007) (same); *Lively v. Dynegy, Inc.*, 420 F. Supp. 2d 949, 951 (S.D. Ill. 2006) (plaintiffs sought to represent class of plan participants for whose individual accounts the plan held shares of company stock); *Rankin v. Rots*, 220 F.R.D. 511, 517 (E.D. Mich. 2004) (subset of thousands of affected participants); *Kling v. Fidelity Management Trust Co.*, 270 F. Supp. 2d 121, 125 (D. Mass. 2003) (subset of 3,500 participants who invested in plan's most popular investment option). Thus, any ruling that Section 502(a)(2) claims could only be asserted where all plan participants were affected would be widely felt by participants in increasingly popular defined contribution plans.

The Fourth Circuit mistakenly feared that if Mr. LaRue's claim were cognizable under Section 502(a)(2), then "every purely individual claim for breach of fiduciary duty" would be transformed into a Section 502(a)(2) claim. *LaRue II*, 458 F.3d at 361. As *Russell, Varity,* and a host of other decisions illustrate, many claims for breach of fiduciary duty are not cognizable under Section 502(a)(2) because the alleged breach has not caused losses to a plan. Indeed, the Fourth Circuit cited some of these cases, but failed to recognize that their common characteristic is that they involved claims for losses suffered by participants rather than by plans. *LaRue II*, 458 F.3d 363-64. For example, the Fourth Circuit quoted *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 149 (2d Cir. 1999), as holding

that "an individual plaintiff 'cannot proceed under Section 502(a)(2) because it affords no remedies to individual beneficiaries.'" *LaRue II*, 458 F.3d at 363. *Strom* involved a claim by a plan beneficiary that a fiduciary had failed to forward life insurance plan enrollment forms to the plan's insurance carrier, with the result that, when the plan participant died, the beneficiary received no benefit. *Strom*, 202 F.3d at 140. Just as in *Russell*, there was no harm to the plan from the breach; indeed, the plan had more assets as a result than if the fiduciary had fulfilled its duty to timely forward the enrollment materials. Just like *Russell*, *Strom* stands for the proposition that Section 502(a)(2) does not authorize relief for injury directly to a plan participant, not for the proposition that no individual can proceed under Section 502(a)(2) to compel a fiduciary to restore losses to a plan or that the losses sought to be recovered must have affected more than one account in a defined contribution plan.

In sum, Section 502(a)(2) does not provide a cause of action to participants like Ms. Russell or beneficiaries like Ms. Strom, who allege breaches causing losses to themselves, but does provide a cause of action to participants like Mr. LaRue, who alleges a breach causing losses to his plan.

II. Make-Whole Monetary Relief Is "Appropriate Equitable Relief" Against a Breaching Fiduciary Within the Meaning of Section 502(a)(3).

The second question presented, whether an action by a plan participant for make-whole monetary relief against a breaching fiduciary seeks "equitable relief" within the meaning of ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), is of considerable importance. NELA urges the Court to

reach this issue even if the Court holds that Petitioner's claim to restore losses to his defined contribution plan is cognizable under Section 502(a)(2). NELA joins the arguments of Petitioner, the Government, and other *amici* that make-whole monetary relief against a breaching fiduciary was "typically available in equity" as required by *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), and is therefore "appropriate equitable relief" under Section 502(a)(3).

NELA further submits, however, that the *Mertens* "typically available in equity" standard finds no support in the legislative history of ERISA or equity jurisprudence, has led to inconsistent outcomes in the lower courts, deprives plan participants of remedies for breaches of statutorily-imposed duties, and should be rejected in favor of a recognition that the trust-law duties incorporated into ERISA are matched by trust-law remedies, including make-whole monetary relief against breaching fiduciaries.

A. The *Mertens* Standard Requiring That Relief Have Been "Typically Available in Equity" Is Incorrect and Unworkable; Correctly Interpreted, Section 502(a)(3) Authorizes All Relief Available Against a Fiduciary for Breach of Trust.

The trust-law origins of ERISA dictate that "equitable relief" under Section 502(a)(3) incorporates the well-established, traditional remedies of a beneficiary against a breaching fiduciary, including make-whole monetary relief. This case offers an opportunity for the Court to revisit *Mertens* and return Section 502(a)(3) remedies to the trust-law framework that Congress intended. As Professor Langbein has demonstrated in his frequently cited article on Section 502(a)(3), this Court's departure

from the trust-law basis of ERISA in its seminal remedies cases has profoundly frustrated Congress's objective of coupling the fiduciary obligations of the trustee of an express trust with effective remedies to enforce those duties. John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 COLUMBIA L. REV. 1317, 1318-54 (2003) (hereinafter "Langbein").[7]

1. ERISA Is a Regulatory Regime Developed Within the Trust Model.

In response to the widespread corruption in the administration of pension and benefit plans, Congress enacted ERISA's fiduciary and remedies provisions. Langbein at 1324 n.37. As discussed above in Section I, ERISA imposes a rule of mandatory trusteeship, requiring that "all assets of an employee benefit plan shall be held in trust by one or more trustees." ERISA § 403(a), 29 U.S.C. § 1103(a). ERISA further requires every plan to "provide for one or more named fiduciaries" who are empowered "to control and manage the operation and administration of the plan." ERISA § 402(a), 29 U.S.C. § 1102(a). A person is a fiduciary with respect to a plan to the extent he or she exercises discretionary control respecting management of the plan or exercises any authority or control respecting management or disposition of its assets. ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i).

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[7] In general, "academics and legal commentators have been extremely critical of the holding espoused in *Mertens* because of its narrow scope and unjust result." *Gerbec v. United States*, 164 F.3d 1015, 1024 (6th Cir. 1999) (collecting commentaries).

Patterned after the two great principles of trust fiduciary law, loyalty and prudence, Langbein at 1325, ERISA requires that a fiduciary discharge his or her "duties with respect to a plan solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . with the care, skill, prudence, and diligence, under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." ERISA § 404(a)(1), (B), 29 U.S.C. § 1104(a)(1); RESTATEMENT (SECOND) OF TRUSTS, § 170(1) (loyalty) and § 174 (prudence) (1959).

This Court has emphasized that in interpreting ERISA it will be "guided by principles of trust law" due to the clear legislative history stating Congress's intent to incorporate these principles into the statute. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 111 (1989); *see Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985); *Varity Corp.*, 516 U.S. at 496 (recognizing that fiduciary duties under ERISA "draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment"); *Russell*, 473 U.S. at 152-53 (Brennan, J., concurring) ("Congress intended by § 404(a) to incorporate the fiduciary standards of trust law into ERISA.").

Thus, this Court has recognized that "[w]hen federalizing the administration of pension and employee benefit plans in ERISA, Congress made a deliberate choice to subject these plans to the pre-existing regime of trust law rather than to invent a new regulatory structure." Langbein at 1319, 1324-31. ERISA's drafters wanted to "apply

rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries." H.R. CONF. REP. NO. 93-1280, at 295 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5076. Accordingly, trust law provides the starting point for the analysis of "appropriate equitable relief" in claims brought pursuant to ERISA § 502(a)(3). *Harris Trust*, 530 U.S. at 250.

2. ERISA Remedy Law Tracks Trust Remedy Law, Which Provides an Aggrieved Trust Beneficiary Make-Whole Relief.

The law of trusts has long exhibited a three-part remedial system. Langbein at 1333. An aggrieved trust beneficiary may recover (1) for loss incurred, (2) for any profits that the trustee made in breach of trust, and (3) for any gains that would have accrued but for the breach. *Id.* In other words, "trust remedy law allows recovery for loss, restitution of profits, and recovery of foregone gains." *Id.* at 1334.[8] Indeed, cases awarding money damages for consequential harm, either to the trust or to the beneficiary, are commonplace in trust remedy law. *Id.* at 1337. The Uniform Trust Code of 2000 states, "[T]he court may . . . compel the trustee to redress a breach of trust by paying money." Unif. Trust Code Section 1001(b)(3) (amended 2001), 7C U.L.A. 221 (Supp. 2003).

As Professor Langbein explains, these trust remedies are analogous to Section 502(a)'s three-part remedial

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[8] Because of the limited scope of relief available for breach of trust, incorporating trust remedy law gives content to the term "equitable relief" in Section 502(a)(3). *Cf. Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens* for the proposition that " '[e]quitable relief' must mean *something* less than *all* relief").

system. *Id.* at 1334-35. Section 502(a)(1) authorizes a participant or beneficiary to bring an action "to recover benefits due." ERISA Section 502(a)(1). Section 502(a)(2), provides for actions invoking fiduciary liability under Section 409(a), which provides for recovery by the plan. *Russell*, 473 U.S. at 140. Section 409, as discussed above, authorizes recovery for "any losses," "any profits," and "such other equitable or remedial relief as the court may deem appropriate." ERISA Section 409(a). ERISA Section 502(a)(3), the "catchall" provision, *Varity*, 516 U.S. at 512, authorizes injunctive relief against "any act or practice which violates any provision of [ERISA's Title I] or other appropriate equitable relief . . . to redress such violations." ERISA Section 502(a)(3). The "other appropriate equitable relief" completes ERISA's "absorption of trust remedy law" by providing a participant or beneficiary a remedy for violations of ERISA not remedied under the other subsections. Langbein at 1335.

3. The *Mertens* Standard Departs From the Trust-Law Paradigm That Congress Intended.

The *Mertens* majority departed from this trust-law framework by decoupling ERISA remedy law from ERISA fiduciary law. Langbein at 1331. Despite the drafters' intention to apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries, *id.*, *Mertens* "rejected the claim that the special equity-court powers applicable to trusts define the reach of § 502(a)(3)."[9] *Great-West*, 534 U.S. at 219. In place of

[9] However, the Court did acknowledge that "at common law, the courts of equity had exclusive jurisdiction over virtually all actions by

(Continued on following page)

well-established, traditional trust-law remedies, *Mertens* substituted the novel category of "relief typically available in equity," a standard that the majority acknowledged represented an "unlikely" interpretation of ERISA. *Mertens*, 508 U.S. at 257. The category of relief "typically available in equity" exists nowhere outside of *Mertens*. It has "no ascertainable meaning." Langbein at 1353.

The *Mertens* majority failed to populate this category with any meaningful exemplars. As Professor Langbein has demonstrated, none of the majority's three examples of "typically equitable relief" – injunction, mandamus, and restitution – explains what relief is "equitable relief" within the meaning of Section 502(a)(3). *Id.* at 1353-54. Injunction is separately provided for in Section 502(a)(3), mandamus is a purely legal remedy, and restitution, as this Court subsequently recognized in *Great-West*, can be legal or equitable depending on the underlying cause of action. *Id.* at 1353-58; *Great-West*, 534 U.S. at 214-15. Yet the lower courts have clung to these three examples as "archetypes," *LaRue I*, 450 F.3d at 575, because the concept of relief "typically available in equity" gives no guidance in deciding what relief is "appropriate equitable relief" and what is not.

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beneficiaries for breach of trust," and "that money damages were available in those courts against the trustee." *Mertens*, 508 U.S. at 256.

B. The *Mertens* Standard Has Resulted in Inconsistent Outcomes in the Lower Courts and a Judicial Outcry Against "Betrayal Without a Remedy."

In the absence of useful guidance on the meaning of "equitable relief," the lower courts have reached inconsistent results regarding the availability of make-whole monetary relief in cases of breach of fiduciary duty under ERISA. For example, in *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376 (9th Cir. 1996), the court held that there was no remedy available under Section 502(a)(3) where the employer-fiduciary failed to inform the employee of her eligibility to participate in a benefit plan. 102 F.3d at 378. In contrast, in *Krohn v. Huron Memorial Hosp.*, 173 F.3d 542 (6th Cir. 1999), the court remanded for issuance of an order that a fiduciary to pay the benefits that the participant would have received had the fiduciary provided her with correct information about her benefits. *Id.* at 552. In *Calhoon v. Trans World Airlines, Inc.*, 400 F.3d 593, 598 (8th Cir. 2005), medical plan participants on COBRA continuation coverage could not recover for medical expenses they incurred when their coverage lapsed due to a fiduciary's failure to process an address change. Yet in *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000), a medical plan participant was permitted to tender the COBRA premium that she would have paid but for misinformation provided by a fiduciary, upon which she would receive reimbursement for medical expenses she had incurred as a result of the loss in coverage, and in *Brown v. Aventis Pharmaceuticals, Inc.*, 341 F.3d 822, 827-28 (8th Cir. 2003), the court affirmed an order for an employer to purchase life insurance for a former employee to place her in the position that she would have occupied

but for the employer's failure to notify her of her right to convert her group life insurance coverage.

In an attempt to ameliorate the situation created by its own and other circuits' erroneous readings of this Court's decisions, the Ninth Circuit opined in *Peralta v. Hispanic Business Inc.*, 419 F.3d 1064 (9th Cir. 2005), that the availability of monetary relief in fiduciary breach cases turns not on an examination of the historical practice of equity as directed by this Court, but on the perceived extent of the fiduciary's wrongdoing:

> There seems to be little problem in providing an avenue for the payment of benefits if serious procedural errors result in the denial of benefits; and in a case such as *Varity,* where fraud is involved, the courts will go to great lengths to find a vehicle for reinstatement of benefits via a § 1132(a)(3) equitable remedy. . . .
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> Individual substantive relief under ERISA is available where an employer actively and deliberately misleads its employees to their detriment. In such cases, wrongs will be undone and means found to make benefits available, as in *Varity, Blau* [*v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984)] and *Hozier* [*v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990)]. Even where benefits are not available under the applicable plan, "appropriate" equitable relief may be awarded. *See, e.g., Varity,* 516 U.S. at 515.

Id. at 1074-75 (footnote omitted). The *Peralta* court opined that Congress provided a remedy in Section 502(a)(3) for "egregious behavior" but not for "merely negligent administration." *Id.* at 1076.

While appealing in its promise that Section 502(a)(3) can be manipulated to find remedies for egregious wrongs, this reasoning finds no support in Section 502(a)(3), *Mertens, Great-West*, or even the Ninth Circuit's own precedents. For example, in one case, the employer breached its fiduciary duty by deliberately misleading plan participants regarding the taxability of distributions under an early retirement program, causing losses to the participants, but the court held that no remedy was available under Section 502(a)(3). *Farr v. U.S. West Communications, Inc.*, 151 F.3d 908, 915-16 (9th Cir. 1998), *amended by* 179 F.3d 1252 (9th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000); *see Eichorn v. AT&T Corp.*, 489 F.3d 590, 591-92 (3d Cir. 2007) (Ambro, J., concurring) (noting plaintiffs presented sufficient proof of intentional interference with benefits to survive summary judgment, but lost anyway due to lack of remedy under *Mertens*). Instead, the courts' inability to give content to the phrase "typically available in equity" in the fiduciary context frequently leaves plan participants and beneficiaries without a remedy. As recognized by Justice Ginsburg's concurrence in *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), this situation can be ameliorated by recognizing that make-whole monetary relief against a breaching fiduciary was typically available in equity at the time of the divided bench – or by "fresh consideration of the availability of consequential damages under § 502(a)(3)" consistent with traditional trust-law remedies. *Davila*, 542 U.S. at 222.

Justice Ginsburg has noted the "rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime." *Id.* (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453 (Becker, J., concurring); *see also Cicio v. Does*, 321 F.3d

83, 106-07 (2d Cir. 2003) (Calabresi, J., dissenting in part) (calling for this Court to "start over" in its analysis of the availability of consequential damages under ERISA), *vacated*, 542 U.S. 933 (2004). In the current "untenable" situation, broad preemption of state-law claims couples with the cramped *Mertens* interpretation of Section 502(a)(3) to produce rights without remedies. *Davila*, 542 U.S. at 222; *see also Allinder v. Inter-City Prods. Corp. (USA)*, 152 F.3d 544, 553 (6th Cir. 1998), *cert. denied*, 525 U.S. 1178 (1999) (noting "betrayal without a remedy" under *Mertens*). As a result, "[j]udicial and scholarly concern could hardly be higher." *Eichorn*, 489 F.3d at 593 (Ambro, J., concurring) (footnotes omitted) (collecting authorities).

Great-West and the profusion of conflicting lower-court decisions pre- and post-dating them demonstrate the imprudence of the *Mertens* Court's departure from the trust-law paradigm. The ahistorical distinction between equitable relief and money damages,[10] the artificial characterization of monetary relief as "instatement" or reinstatement into a plan, and the confusion of equitable with legal restitution have created what the Seventh Circuit has called a "morass" for courts and parties attempting to apply Section 502(a)(3). *See Brosted v. Unum Life Ins. Co. of Am.*, 421 F.3d 459, 466 (7th Cir. 2005).

The trust-law tradition that Congress invoked in drafting ERISA unquestionably provided for make-whole monetary relief against breaching fiduciaries, as the

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[10] "[I]t may once have been technically correct to say that damages were exclusively a common law remedy, but only because damages in equity were called surcharge." Langbein at 1353.

Mertens court acknowledged. *Mertens,* 508 U.S. at 256. Nothing suggests that Congress intended to depart from this tradition in creating ERISA's enforcement scheme. This Court should overrule *Mertens* to bring its interpretation of Section 502(a)(3) in line with Congressional intent and all other areas of ERISA jurisprudence, which acknowledge the trust-law basis of the statute.

Respectfully submitted,

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